

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROTOUCH, L.L.C. and 30/10 WEIGHT
LOSS, LLC,

Plaintiffs,

vs.

PAIGE DOYLE, AWAKEN 180 INC.,
NEWTON WEIGHTLOSS, LLC, PEABODY
WEIGHTLOSS, LLC AND QUINCY
WEIGHTLOSS, LLC,

Defendants.

Case No.: 2:17-cv-00996-MJP

**AGREEMENT REGARDING
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND ORDER**

PAIGE DOYLE, AWAKEN 180 INC.,
NEWTON WEIGHTLOSS, LLC, PEABODY
WEIGHTLOSS, LLC AND QUINCY
WEIGHTLOSS, LLC,

Counterclaimants/Third Party
Plaintiffs

vs.

MICROTOUCH, L.L.C. and 30/10 WEIGHT
LOSS, LLC,

Counterclaim Defendants

and

DR. ROCCO NELSON, an individual; and DR
LINDA DEGROOT (and their marital
community); and one or more JOHN DOES,
currently not known to Third Party Plaintiffs,

Third Party Defendants

1 The parties hereby stipulate to the following provisions regarding the discovery
2 of electronically stored information (“ESI”) in this matter:

3 **A. General Principles**

4 1. An attorney’s zealous representation of a client is not compromised by conducting
5 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate
6 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
7 contributes to the risk of sanctions.

8 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be
9 applied in each case when formulating a discovery plan. To further the application of the
10 proportionality standard in discovery, requests for production of ESI and related responses should
11 be reasonably targeted, clear, and as specific as possible.

12 **B. ESI Disclosures**

13 Within 14 days after the Court issues a Case Scheduling Order, or at a later time if
14 agreed to by the parties, each party shall disclose:

15 1. Custodians. The ten custodians most likely to have discoverable ESI in their
16 possession, custody, or control. The custodians shall be identified by name, title, connection to
17 the instant litigation, the type of the information under his/her control; and the likely sources of
18 their ESI (including, for example, hard drive, laptop, mobile devices, cloud storage, and other
19 cloud sources on or in which such ESI may be stored).

20 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared
21 drives, servers, etc.), if any, likely to contain discoverable ESI.

22 3. Third-Party Data Sources. A list of third-party data sources, if any, likely
23 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”
24 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve
25 information stored in the third-party data source.

1 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable
2 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically
3 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
4 P. 26(b)(2)(B).

5 **C. Preservation of ESI**

6 The parties acknowledge that they have a common law obligation to take reasonable and
7 proportional steps to preserve discoverable information in the party's possession, custody or
8 control. With respect to preservation of ESI, the parties agree as follows:

9 1. Absent a showing of good cause by the requesting party, the parties shall not
10 be required to modify the procedures used by them in the ordinary course of business to back-
11 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in
12 their possession, custody, or control.

13 2. All parties shall supplement their disclosures in accordance with Rule 26(e)
14 with discoverable ESI responsive to a particular discovery request or mandatory disclosure
15 where that data is created after a disclosure or response is made (unless excluded under (C)(3)
16 or (D)(1)-(2) below).

17 3. Absent a showing of good cause by the requesting party, the following
18 categories of ESI need not be preserved:

- 19 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 20 b. Random access memory (RAM), temporary files, or other ephemeral
21 data that are difficult to preserve without disabling the operating system.
- 22 c. On-line access data such as temporary internet files, history, cache,
23 cookies, and the like.
- 24 d. Data in metadata fields that are frequently updated automatically, except
25 last-opened dates, last-edited or last-modified dates, and the "last modified
26 by" or "last edited" by metadata fields (see also Section (E)(5)).
- e. Back-up data that are substantially duplicative of data that are more
 accessible elsewhere.
- f. Server, system or network logs.

- 1 g. Data remaining from systems no longer in use that is unintelligible on the
systems in use.
- 2 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or
3 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry
4 devices), provided that a copy of all such electronic data is routinely saved
elsewhere (such as on a server, laptop, desktop computer, or “cloud”
5 storage).
- 6 i. Social media data, except that the parties shall not delete any existing
7 social media accounts for Yelp, Facebook, Twitter, Instagram or Pinterest,
and shall preserve those social media accounts’ “account history” or
“account data” where available (see also Section E(3)(e)).

8 **D. Privilege**

- 9 1. With respect to privileged or work-product information generated after the filing
10 of the complaint, parties are not required to include any such information in privilege logs.
- 11 2. Activities undertaken in compliance with the duty to preserve information are
12 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).
- 13 3. Information produced in discovery that is protected as privileged or work product
14 shall be immediately returned to the producing party, and its production shall not constitute a
15 waiver of such protection, if: (i) such information appears on its face to have been inadvertently
16 produced or (ii) the producing party provides notice within 15 days of discovery by the
17 producing party of the inadvertent production.

18 **E. ESI Discovery Procedures**

- 19 1. On-site inspection of electronic media. Such an inspection shall not be permitted
20 absent a demonstration by the requesting party of specific need and good cause or by agreement
21 of the parties.
- 22 2. Search methodology. The parties shall timely attempt to reach agreement on
23 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
24 any such effort is undertaken. The parties shall continue to cooperate in revising the
25 appropriateness of the search terms or computer- or technology-aided methodology.
- 26 In the absence of agreement on appropriate search terms, or an appropriate computer- or

1 technology-aided methodology, the following procedures shall apply:

2 a. A producing party shall disclose the search terms or queries, if any, and
3 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
4 parties shall meet and confer to attempt to reach an agreement on the producing party's search
5 terms and/or other methodology.

6 b. If search terms or queries are used to locate ESI likely to contain
7 discoverable information, a requesting party is entitled to no more than 10 additional terms or
8 queries to be used in connection with further electronic searches absent a showing of good cause
9 or agreement of the parties. The 10 additional terms or queries, if any, must be provided by
10 the requesting party within 14 days of receipt of the producing party's production.

11 c. Focused terms and queries should be employed; broad terms or queries,
12 such as product and company names, generally should be avoided. Absent a showing of good
13 cause, each search term or query returning more than 250 megabytes of data are presumed to be
14 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
15 types.

16 d. The producing party shall search both non-custodial data sources and ESI
17 maintained by the custodians identified above.

18 3. Format. The parties agree that ESI will be produced to the requesting party in the
19 following formats:

20 a. All documents that exist in native formats, with the exception of emails
21 (see Paragraph 3.b. below), including but not limited to Word documents, Excel spreadsheets,
22 PowerPoint presentations, video files, audio files, and similar native formats, will be produced in
23 their original, native, unaltered format. Each native document will be given a unique digital
24 identifier, and the parties will refer to that identifier in discovery and court filings. To the extent
25 that documents produced in native format cannot be rendered or viewed without the use of
26 proprietary software, the parties shall meet and confer to minimize any expense or burden

1 associated with the review of such documents, including issues that may arise with respect to
2 obtaining access to any such software or operating manuals. If production of a particular
3 document as a native format file would result in the disclosure of information protected by the
4 attorney-client privilege, the work-product doctrine, or that is otherwise protected from discovery,
5 the producing party may object to its production as a native file and produce the document at issue
6 with redactions in searchable PDF files with unique digital identifiers. Wherever possible, the
7 remainder of the document should be produced in native format (for example, Excel spreadsheet
8 portions that need not be redacted).

9 b. All e-mails should be produced in an archival or electronic data package
10 format such as .pst, .ost, .mbox, or similar, in a manner that preserves the relationship between
11 the e-mail and all of its attachments. Any attachments to an e-mail should be produced in the
12 same electronic form in which they were transmitted.. Each email and attachment will be given
13 a unique digital identifier in an accompanying .Bates Stamped PDF document and the parties
14 will refer to that identifier in all proceedings. If production of a particular email in this format
15 would result in the disclosure of information protected by the attorney-client privilege, the work-
16 product doctrine or that is otherwise protected from discovery, the producing party may object to
17 its production in this format and produce the email with redactions in searchable PDF files with
18 unique digital identifiers. Wherever possible, the remainder of the document should be produced
19 in native format (for example, email attachments or portions of email attachments (such as Excel
20 spreadsheet portions) that need not be redacted).

21 c. Documents that exist in PDF format will be produced as searchable PDF
22 files that are Bates numbered, in color when the original is in color.

23 d. Paper documents amenable to being imaged will be produced as searchable
24 PDF files that are Bates numbered, in color when the original is in color. Reasonable efforts shall
25 be made to scan the pages at or near their original size. Physically oversized originals, however,
26 may be reduced provided that such reduction does not obscure any text or otherwise make the

document unreadable. In addition, reducing an image may be necessary to display production numbers and confidentiality designations without obscuring the text. The parties agree not to degrade the searchability of documents as part of the document production process. If a party desires additional information about a particular paper document produced in this form, the Parties will meet and confer regarding the appropriate means to supply that information.

e. To the extent reasonably possible and subject to the proportionality provisions of the Federal Rules of Civil Procedure, responsive information from Yelp, Facebook, Twitter, Instagram, and Pinterest social media accounts in the possession, custody or control of the parties shall be produced in the following manner: (1) text or picture posts shall be either printed and produced as PDF files or captured by screenshot and produced as JPG files (in color when the original is in color); and (2) audio or video posts shall be produced as audio or video files. The parties shall produce in a manner that identifies the date of the produced post and the social media account it came from. If the parties' social media accounts contained responsive posts in the past that have since been deleted, overwritten or modified, then the parties shall meet and confer to discuss the potential production of that historical information (for example, from a social media account's "account history" or "account data" where available and to the extent possible).

4. De-duplication. The parties may de-duplicate their ESI production across custodial and non-custodial data sources after disclosure to the requesting party. If a document is de-duplicated, then the metadata field called "OTHERCUSTODIANS" must be provided listing the identities of other custodians who were in possession of the document at the time of collection, but whose copy has been withheld as a duplicate.

5. Metadata fields. If the requesting party seeks metadata, the parties agree that only the following metadata fields need be produced: document type; custodian and duplicate custodians (or, if none, a generalized location); author/from/sender; recipient/to, cc and bcc; title/subject; file name and size; original file path; date and time created, sent, modified and/or received; and hash value.

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By: /s/ Janissa A. Strabuk

By: /s/ Noelle L. Chung

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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED this 19th day of December, 2017.


Marsha J. Pechman
United States District Judge